

(2007) 01 GAU CK 0025

Gauhati High Court

Case No: Regular Second Appeal No. 90 of 1999

Suniti Rani Nath

APPELLANT

Vs

Pabitra Kr.Nath (deceased by
LRs)

RESPONDENT

Date of Decision: Jan. 25, 2007

Acts Referred:

- Civil Procedure Code, 1908 - Order 6 Rule 4
- Civil Procedure Code, 1908 (CPC) - Order 6 Rule 4

Citation: AIR 2007 Guw 128 : (2008) 2 GLR 520

Hon'ble Judges: H. N. SARMA, J

Bench: Single Bench

Advocate: B. C. Das, Sr. Counsel, B. Kar Purkayastha and A. Das M. Bhuya and H. Das,
Advocates appearing for Parties

Judgement

1. Challenging the legality, validity and justifiability of the impugned judgment and decree passed by the learned Civil Judge, Sr. Division (No. 2), Silchar in Title Appeal No. 9/1991 dated 1281999 thereby dismissing the appeal filed by the plaintiff/appellant and also divest the appellant out of the right, title and interest

whatever was declared in her favour by the learned trial Court vide judgment and order dated 1231991 passed in Title Suit No. 19/1986, the plaintiff/appellant has filed this second appeal.

2. I have heard Mr. B. C. Das, the learned Sr. Counsel for the appellant and also heard Mr. M. Bhuya, the learned counsel appearing for the respondents.

3. The pleaded case of the plaintiff in brief is that one Giridhar Paul was the original owner of the suit land, which was purchased by the defendant No. 1 and his other two brothers and became the owner thereof. Later on the defendant No. 1 on 741970 having purchased the share of the other coowners became absolute owner

of the entire land measuring 1 Bigha, 19 Katha, 1 Ch. covered by 2nd R. S. Patta No. 168, Dag No. 548/547/546/407 and 409/744 and Dag No. 745 of 2nd R. S. Patta No. 204. The defendant No. 1 sold the land so purchased by him to the plaintiff on 1341983, and this is the suit land in the case. It is further pleaded that out of the aforesaid purchased land in some area the plaintiff was a tenant and the defendant No. 1 having expressed his intention to acquire title over the suit land a registered agreement to that affect was executed on 1751982. It is further pleaded that before execution of the sale deed in terms of the agreement it was known that the land in Dag No. 407/408 in 2nd R.S. Patta No. 168 does not confirm the actual area agreed to be conveyed upon the plaintiff as per the aforesaid agreement. Accordingly, by executing the sale deed on 1341983 the defendant No. 1 sold the scheduled land in favour of the plaintiff. It is further pleaded that after purchase of the said land the plaintiff having applied for mutation of her name in the revenue record the defendants raised objection and the mutation order could not be passed, and that in the month of June 1983, the defendant Nos. 1 and 3 illegally trespassed into the land described in schedule 3 and disturbed the possession of the plaintiff to that extent and accordingly, a cloud over the title of the plaintiff having been cast, for removal of the same and for recovery of the possession of the suit land described in the schedule, the present suit was filed praying for declaration of right, title and interest of the plaintiff over scheduled 1 land, for recovery of possession from the defendant Nos. 1, 2 and 3 in respect of schedule 3 land and for confirmation of position over schedule 2 land.

4. The defendant contested the suit by filling written statement. Although, the defendant No. 1 filed a separate written statement and whereas the other defendants filed a common one, the basic defence pleaded by the defendants remaining the same. Apart from taking usual plea of want of cause of action etc. The defendants also pleaded that the land described in schedule 3 was sold by defendant No. 1 in favour of defendant No. 2 vide registered sale deed on 1151984 and, thereafter, he further sold the land covered by Patta No. 204 Dag No. 745 and under Patta No. 168 Dag No. 548/547/546/407/408/409/744 as mentioned in schedule 3 measuring an area of 1 Bigha 19 Katha 1 Ch. to the defendant No. 3 by registered sale deed. Regarding the sale of the suit land in favour of the plaintiff vide sale deed dated 651983, it is alleged that the said sale deed is inconsistent with the earlier agreement entered into between the parties on 1751982 in as much as the schedule of the sale deed drastically differed from the schedule otherwise mentioned in the agreement dated 1751982 and no right can be claimed by the plaintiff on the basis after the sale deed though the defendant agreed to the execution of the sale deed they have not accepted the terms thereof, i.e. regarding the sale of the scheduled land contained in the sale deed. It is also alleged that the plaintiff in collusion with the deed written got the deed dated 1341983 executed with mala fide motive, and the contents of the sale deed were not read over and explained to defendant before its execution. Pleading in the aforesaid manner the

defendant prayed for dismissal of the suit.

5. The learned trial Court on the basis of the pleadings of the parties framed as many as 9 issues, out of which issue Nos. 6, 8 and 9 are as follows :

"6) Whether the plaintiff has got right title and interest over the suit land?

(8) Whether the plaintiff has right, title and interest over lands described in the schedule 1 of the plaint and whether the plaintiff has dispossessed the defendant Nos. 1, 2 and 3 from the land under scheduled 111 of the plaint?

(9) Whether the alleged sale deed No. 3811 of 1983 is genuine?"

6. During the course of trial plaintiff

examined as many as 4 P.Ws. whereas the defendant examined 5 D.Ws, and also exhibited certain documents in support of their respective cases. The learned trial Court, at the end of the time, vide judgment and order dated 27/2/1991 deciding the issue No. 6 held that the sale deed dated 6/5/1983 (Exhibit4) was executed fraudulently and the same is not a genuine one, but however, declared right, title and interest for the plaintiffs over the scheduled 3 land and granted the relief to the extent of recovery of the possession from an area of 7 Kathas thereof failing under second R.S. Patta No. 168, Dag No. 407/408. The aforesaid judgment was carried into Title Appeal No. 9/91 in the Court of the learned Civil Judge, Sr. Division 2, Silchar. The learned Appellate Court however, not only dismissed the appeal filed by the plaintiff/appellant but also reversed the decision of the trial Court in respect of issue No. 6 relating to schedule 3 land, vide judgment and order dated 12/3/1999 which is the subject matter of this present appeal.

7. The learned counsel for the parties raised the following substantial question of law that emerges from record for disposal of this Appeal :

(i) Whether the sale deed dated 6/5/1983 (Exhibit4) is vitiated by fraud, in as much as, it substantially differed from the terms of the earlier agreement vide Exhibit5 and the learned Courts below were justified in accepting the same to be a fraudulent document.

(ii) Whether the defendant/respondent nor having filed any appeal against any part of the decree passed by the learned Trial Court and even not filing any crossobjection it was open for the learned First Appellate Court to reverse the findings of the learned trial Court on issue No. 7.

8. I have considered the rival submissions made by the learned counsel for the parties and also perused the connected records of the case. Both the Courts below are unanimous in their findings that the Exhibit4 sale deed is vitiated by fraud; however, the learned trial Court, on the basis of the proved facts, decided the issue No. 7 in favour of the plaintiff declaring right, title and interest over the suit land mentioned in scheduled 3 of the land on the ground that the subsequent sale of the

part of the land covered by the said schedule would not disturb the right, title and interest of plaintiff over that area which was sold to the plaintiff on prior point of time. The learned Appellate Court, however, confirming the view of the learned trial Court that the Exhibit4 is vitiated by fraud held that since the Exhibit4 is a fraudulent one no right of the plaintiff over any part of the property affected thereby would be available to sustain his right, title and interest, as the document itself is vitiated by fraud. The admitted position is that against the aforesaid findings of the learned Trial Court arrived at against the defendants/respondents, no appeal or crossobjection was filed by them.

The learned Appellate Court dismissed the suit of the plaintiff in its entirety. The case of the defendant challenging the Exhibit4 is that the said document was registered without reading over the contents of those documents to defendant No. 1. The executant and the scheduled mentioned in Exhibit4 substantially differs from the earlier agreement of sale vide Exhibit5. It is not pleaded by the defendant that there was no consideration for the sale so offered by the sale deed. It is not pleaded by the defendant that he did not put the signature in the sale deed or his signature was forged. The Exhibit4 further discloses that the said deed was executed by the defendant on 13/4/1983 and was registered on 6/5/1983. It is not that in the sub registry office the signature of the defendant No. 1 was taken in the sale deed by the plaintiff misrepresenting him, in order to sustain in the defendant of fraud. O. 6, R. 4, CPC casts an obligation that such particulars, such fraud, is to be pleaded with necessary specifications. The provision of Order 6, Rule 4 is a mandatory requirement of law as held by the Apex Court in the case reported in 2004 (7) SCC 251 : (AIR 2004 SC 3504) (Pukhraj D. Jain v. G. Gopala Krishna), 2006 (5) SCC 638 : (AIR 2006 SC 3672) (Ramesh B. Desai v. Bipin Vadilal Mehta). Again turning to the main allegation of the defendant No. 1 is that the Exhibit4 contents property in its scheduled which was not in fact therein Exhibit5 in the earlier agreement, the recital of the sale deed itself discloses the fact of execution of earlier agreement vide Exhibit5. That apart the recital of the sale deed also discloses that out of the scheduled property some portions were subjected to the earlier agreement vide Exhibit5. Thus the Exhibit4 on the face of it discloses that property conveyed thereby is under same area which were agreed to sell vide Exhibit5 and did not confine to property covered by agreement for sale. In order to have a valid sale, it is not necessary that such a sale deed must proceed with an agreement of sale. Both the Courts below missed this basic facts that are writ large on the face of Exhibit4 and 5 and erroneously held that Exhibit5 is a fraudulent document.

So far the plea of fraud is concerned the pleadings of the defendant as indicated above, do not disclose the necessary particulars. The ground as pleaded in the written statement can hardly be said to fulfill the requirement of Order 6, Rule 4 of the CPC. The necessary required particulars, with specifications, have not been

pleaded by the defendant. The ground of not reading over the sale deed, Exhibit4 to the defendant No. 1 the executant of the deed, will not vitiate the sale deed, in as much as the sale deed was executed by the defendant No. 1 himself which is an admitted fact. After executing the said deed containing necessary recitals as indicated above, now he cannot be permitted to turn around and submit that the scheduled property mentioned in the sale deed was not sold by him, where nonreceipt of consideration money has also not been pleaded. Such as oral statement of the defendant would be hit under Section 91 of the Indian Evidence Act.

9. The Exhibit4 has not been challenged on any other ground upon which such a sale deed could be challenged under the law, except on the allegation of fraud which is not sustainable. Both the learned Courts below erred on this basic fundamental principles of law regarding the pleading and proof of the allegation of the fraud in a civil suit, apart from the perversity that Exhibit4 sale deed is inconsistent with Exhibit5 agreement. Accordingly the substantial question of law No. 1 framed in this appeal is decided in favour of the plaintiff/appellant or against the defendants/respondents.

10. Turning down to the other substantial question of law as noted above, it is an admitted fact that the defendants/respondents did not prefer any appeal challenging the judgment and decree passed by the learned trial Court nor filed any crossobjection. It is no doubt from that Order 41, Rule 22 provides a right upon a party to support the decree passed in his favour by objecting to some other parts of the impugned judgment even without filing crossobjection. But requirement of law is that such objection must be raised by the concerned affected party at appropriate stage. In the instant case, however, the impugned judgment does not disclose that the defendants/respondents have raised such a plea authorizing the Appellate Court to act in term of Order 41, Rule 22, CPC. It is also to be seen whether the power vested under Order 41, Rule 33, CPC can be exercised by the Appellate Court to set aside the decree passed by the learned Trial Court without raising any objection by the so called aggrieved party. In this connection, the decision of the Apex Court reported in (2003) 9 SCC 606 : (2003 All LJ 1141) (Banarsi v. Ram Phal) can be conveniently referred to, wherein the Apex Court held inter alia that the well settled position of law under the unamended CPC prior to 1976 was that any respondent though he may not have filed an appeal from any part of the decree may still support the decree to the extent to which it is already in his favour by laying challenge to a finding recorded in the impugned judgment against him; where a plaintiff seeks a decree against the defendant on the certain grounds, any one of such grounds being enough to entitle the plaintiff to a decree and the Court has passed decree on one such ground deciding it for the plaintiff while the remaining are decided against the plaintiff, in an appeal preferred by the defendant, in spite of the finding on other ground being reversed, the plaintiff as a respondent can still seek to support the decree by challenging the finding on such other grounds and

persuade the appellate Court to form an opinion that in spite of the finding on that ground being reversed to the benefit of the defendant/appellant the decree could still be sustained by reversing the finding on the other grounds, though the plaintiff/respondent has neither preferred an appeal of his own nor taken any crossobjection; a right to file crossobjection is the exercise of right to appeal though in a different form and just as an appeal is preferred by a person aggrieved by a decree, so also a crossobjection can be preferred by one who can be said to be aggrieved by the decree. A party who has fully succeeded in the suit can and needs to neither prefer an appeal nor take any crossobjection though certain finding may be against him. Appeal and crossobjection both are filed against decree and not against judgment and certainly not against any finding recorded in a judgment.

The Apex Court further held that the exercise of power under Order 41, Rule 33 has got certain limitations; firstly the power cannot be exercised to the prejudice or disadvantage of a person not a party before the Court, secondly a claim given up or lost cannot be revived and thirdly such part of the decree which essentially ought to have been appealed against or objected to by a party and which that party has permitted to achieve a finality, cannot be reversed to the disadvantage of the other party.

11. In the instant case, what the learned Appellate Court did is hit by the 3rd contingencies referred to above and by the impugned judgment of the First Appellate Court the plaintiff has been put into further worst position than it was before filing the appeal. In view of the aforesaid position in law, the exercise of power by the learned Appellate Court suo motu reversing the findings of the learned trial Court in respect of the concerned scheduled land, cannot be sustained.

12. Consequently in view of the aforesaid discussion, the 2nd substantial question of law so framed in appeal is decided in favour of the appellant/plaintiff and against the respondents/defendants.

13. The learned Court below held that Exhibit4 to be a fraudulent one and in view of the above discussion, the said findings cannot stand and hence set aside. Answering the substantial question of law in favour of the plaintiff/appellant, the impugned order passed by the learned Court below are set aside and quashed.

14. Accordingly, the suit of the plaintiff/appellant stands decreed.

15. The appeal is allowed, but without any cost.

Appeal allowed.